Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

REMGRIT CORPORATION,

Petitioner,

v.

REMINGTON ARMS CO., INC., and
E.I. DU PONT DE NEMOURS & CO.,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are the Due Process Rights of a litigant violated when the Court of Appeals fails to address any of the substantive issues raised on appeal, where one of those issues was that the trial below was conducted unfairly?

2. Is a litigant denied its Right to a Jury Trial when the trial court submits a special interrogatory to the jury which asks the jury to decide an issue which is the exact opposite of the claim made by the litigant?

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REMGRIT CORPORATION,

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Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

The Petitioner Remgrit Corporation respectfully prays that a writ of certiorari issue to review the September 20, 1993 judgment and opinion of the United States Court of Appeals for the Fourth Circuit and the October 13, 1993 denial of its Motion for Rehearing and Suggestion for Rehearing *en banc* in the above captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit dated September 20, 1993 has not been reported and is reprinted in the appendix hereto at App. 1.

The denial of the Petitioner's Motion for Rehearing and Suggestion for Rehearing *en banc* by the United States Court of Appeals for the Fourth Circuit dated October 13, 1993 has not been reported and is reprinted in the appendix at App. 9.

The judgment of the United States District Court for the District of South Carolina dated May 10, 1991 has not been reported and is reprinted in the appendix at App. 7.

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals for the Fourth Circuit dated September 20, 1993. Petitioner's subsequent Motion for Rehearing and Suggestion for Rehearing *en banc* was denied on October 13, 1993. The Supreme Court has jurisdiction to review cases from the United States Courts of Appeals by virtue of 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in pertinent part that "nor shall any state deprive any person of life, liberty, or property, without due process of law." The Seventh Amendment of

the United States Constitution provides in pertinent part that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

STATEMENT OF THE CASE

Petitioner RemGrit Corporation[1] (RemGrit), the purchaser of an abrasive products business formerly owned and operated by the Respondents, filed this action in diversity on February 1, 1988 seeking damages due to misrepresentations by Respondents Remington Arms Co., Inc. (Remington) and E.I. DuPont De Nemours and Co. (DuPont) in the sale of the business and for breach of warranty. The transaction included the sale of manufacturing facilities in Connecticut, inventory and various attendant intangibles including patent rights. RemGrit alleged that Remington and DuPont had withheld from RemGrit or misrepresented certain material information which would have affected RemGrit's decision to purchase the abrasive products business, and which reflected that the business and its associated intangibles were much less valuable than had been represented by Remington and DuPont. RemGrit also alleged that the Respondents had breached various warranties contained in the contract of sale. Remington and DuPont generally denied the allegations of the complaint and counterclaimed for recovery of taxes paid by them and allegedly

[1] The parent corporation of RemGrit is The Intertech Group, Inc. RemGrit has no subsidiaries other than wholly owned subsidiaries.

due from RemGrit, and for additional compensation for inventory purchased from Remington and DuPont by RemGrit as part of the original transaction. Remington and DuPont also filed a cross-claim against ZBS Holdings, a South Carolina general partnership which had as general partners the stockholders of RemGrit.

RemGrit filed an amended complaint on October 21, 1988 generally consistent with the original complaint.[2] Remington and DuPont timely answered, counterclaimed and cross claimed on November 7, 1988. Because the case involved enormous quantities of evidence and several complex issues, discovery was lengthy and complex, requiring ten (10) pre-trial hearings before the case was ready for trial.

The case was tried to a jury February 27 through March 16, 1990 before the Hon. Sol Blatt, Jr. in the District Court of South Carolina, Charleston Division. Part way through the trial the District Judge imposed an arbitrary twenty hour limit on both sides for the presentation of their cases despite the complexity of the issues and the amount of evidence to be presented. The District Judge participated in the trial excessively and continually interjected his opinions into the proceedings throughout. In his instructions to the jury the District Judge incorrectly instructed the jury that RemGrit could have obtained an injunction against those infringing upon the patents RemGrit had just purchased, even if Remington and Du Pont had been guilty of laches by failing to enforce the patents against infringement. Counsel for RemGrit

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[2] The Amended Complaint is reprinted at App. 16.

pointed this error out to the District Judge prior to the jury's beginning deliberations; however, the District Judge refused to instruct the jury correctly on this issue. The jury returned a verdict which involved answering several special interrogatories. One of the special interrogatories submitted to the jury by the trial judge asked the jury to consider whether RemGrit had established a claim which was the exact opposite of the claim RemGrit had actually made. Counsel for RemGrit pointed this error out to the District Court on at least two occasions prior to jury deliberation, however, the District Court Judge refused to correct the form of the verdict. The net result of the jury verdict was an award to RemGrit in the amount of one hundred thousand dollars ($100,000.00).

RemGrit made a motion for a new trial on numerous grounds which was denied following a post-trial hearing held on April 25, 1991. An Order denying all post-trial motions was entered by the District Court on May 6, 1991[3] and final judgment was entered by the District Court on May 10, 1991. RemGrit thereafter filed a timely appeal with the United States Court of Appeals for the Fourth Circuit on numerous grounds. Remington and DuPont cross appealed. The appeal was argued before the United States Court of Appeals for the Fourth Circuit on May 4, 1992. The appeal was not decided until a *per curiam* opinion issued on September 20, 1993. In its Opinion the Fourth Circuit Court of Appeals failed to discuss any of the substantive issues raised on appeal and instead indicated that:

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[3] That Order is reprinted at App. 11.

> Even a casual review of the briefs in this case reveals that what both parties are really complaining about is the jury verdict . . . The jury came up with a verdict that neither side liked.
>
> We have considered the briefs and the record in this case and, after oral argument, are of opinion that the evidence in the case supports the verdict and that there is no reversible error.

RemGrit thereafter filed a timely Petition for Rehearing and Suggestion for Rehearing *en banc* which was denied on October 13, 1993.

REASONS FOR GRANTING THE WRIT

FAILURE TO ADDRESS ANY OF THE SUBSTANTIVE ISSUES RAISED ON APPEAL IS A VIOLATION OF THE DUE PROCESS RIGHTS OF A LITIGANT, ESPECIALLY WHERE ONE OF THOSE ISSUES IS THAT THE TRIAL WAS CONDUCTED UNFAIRLY

Petitioner contends that the failure of the Court of Appeals to address any of the substantive issues raised on appeal is a violation of the due process rights of the litigants and is such a departure from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision. In addition, by failing to consider the fundamental unfairness with which the trial below was conducted, the Court of Appeals has essentially sanctioned a similar departure from the accepted and usual course of judicial proceedings by the trial court. *See* Supreme Court Rule 10.1(a).

The facts of this case present the Court with an opportunity to address the lack of fairness to litigants

underlying pervasive public dissatisfaction with the legal system. Preoccupation with statistical data and docket management can lead to neglect and abuse of individual rights in particular cases. Justice requires deliberate, impartial, thoughtful and dispassionate consideration of legitimate legal issues. In light of the fact that this appeal languished for fifteen months following oral argument and that the court did not discuss any of the substantive issues on appeal, it appears that in this case the court below failed to give meaningful consideration to the appeal and summarily affirmed the judgment as a matter of convenience to clear its docket of an aged case.

This court has recognized that there is no constitutional right to an appeal where a full and fair trial on the merits has been provided. *Lindsey v. Normet*, 405 U.S. 56 (1972); *Jones v. Barnes*, 463 U.S. 745, 751 (1983). However, where the government has granted the right to an appeal, the availability and providing of appeals must comport with due process and equal protection and may not be arbitrarily denied. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Lindsey*, at 77. In this case, Petitioner has alleged that the trial on the merits was patently unfair and that the Court of Appeals has failed to address that issue in any respect. The net effect therefore was to deny Petitioner any meaningful right to be heard at trial and to arbitrarily deny Petitioner its right to appeal. Under the circumstances, there is a clear violation of Petitioner's right to due process.

Procedural due process includes the right to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437

(1982). This right also extends to appeals where such have been granted to civil litigants. *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (2d Cir. 1986), *rev'd on other gnds.*, 481 U.S. 1 (1987) (when a right of appeal has been granted to civil litigants, federal due process requires that each party be afforded a fair opportunity to obtain an adjudication on the merits of his appeal). Procedural due process is not intended to promote efficiency or accommodate all possible interests; it is intended to protect the particular interests of the litigant. *Fuentes*, n.22 at 90. Although *Fuentes* clearly does not preclude summary disposition of appeals, this court has held that litigants are entitled, at least, to some assurance that an appeal has been considered on the merits, even where the appeal has been disposed of summarily, in a variety of contexts. *Carafas v. LaVallee*, 391 U.S. 234, 242 (1968) (habeas corpus); *Pasadena City Board of Education v. Spangler*, 472 U.S. 424, 440 (1976) (modification of injunction). In *Carafas* the court indicated that "enough must appear to demonstrate the basis for the court's summary action." *Carafas* at 242.

In the case at bar, there is no indication that the Court of Appeals considered the merits of Petitioner's appeal and nothing whatsoever to demonstrate the basis for the court's summary action. The opinion simply lists the grounds for the appeal and, without discussing a single one of the issues raised, facilely concludes only that the litigants were unhappy with the jury verdict and that adequate support for the verdict appears in the record. Despite the fact that the Due Process Clause of the Fourteenth Amendment does not require appellate review only *if a full and fair trial on the merits is provided*, the

Circuit Court opinion fails to address the Petitioner's contention that the trial below was conducted unfairly. *See Lindsey* at 77.

The evidence of unfairness in the record is substantial. At trial, the trial judge unfairly interfered with the presentation of the Petitioner's case in myriad ways. First, he imposed an arbitrary limit of twenty (20) hours on each side for the presentation of its case, including cross-examination of opposing witnesses and arguments on objections, without reference to which side prevailed in that argument. Because the trial judge refused to allow Petitioner any additional time for rebuttal after Respondents' case, the trial judge effectively allowed the Respondents to determine what evidence would be presented to the jury through a number of tactics. Petitioner, as Plaintiff, was first to present its case and was required by the trial judge to list all witnesses to be called at least one day in advance. When requested to reveal which witnesses they intended to call, Respondents indicated that they were having "logistical problems" and could not name their intended witnesses in advance. By refusing to reveal which witnesses they intended to call, as Petitioner was forced to do by the court, Respondents and the court forced Petitioner to reserve time from its case in chief for cross-examination of numerous identified defense witnesses who were never called by Respondents. Instead, Respondents merely implied that they would call all their witnesses. Petitioner was therefore denied the opportunity to present evidence it had hoped to elicit from defense witnesses on cross-examination. Petitioner could have presented this evidence in its case in chief if it had not been forced to limit its total trial time

to twenty (20) hours including cross-examination. Respondents were also able to waste Petitioner's time for presentation of its case by engaging in lengthy and pointless arguments on objections, for which both sides were charged equal time, and prolix and redundant cross-examination of Petitioner's witnesses. Respondents were apparently aware from the beginning that they did not intend to call most of the witnesses they had listed in their answers to interrogatories. Petitioner, obviously, enjoyed no such advantage.

Reasonable time limits for civil and criminal trial are permissible. *U.S. v. Freel*, 681 F.Supp. 766 (D.Fla. 1988). However, the court must analyze each case carefully to assure the time limits are not arbitrary. *U.S. v. Reaves*, 636 F.Supp. 1575 (D.Ky. 1986). Consideration should be given to permitting Plaintiff to add brief additional evidence in rebuttal to the Defendants' case if the original time limits create a hardship which was not foreseen when the time limit was imposed. *SCM Corp. v. Xerox Corp.*, 77 F.R.D. 10 (D.Conn. 1977). Here the time limits were clearly arbitrary and prejudicial to Petitioner. At the very least, Petitioner should have been granted additional time to respond to Respondents' case.

Compounding the error, the trial judge unreasonably refused to allow Petitioner's patent expert to testify in rebuttal to Respondents' expert. The court refused to allow this testimony even though Petitioner still had time remaining and the judge was fully aware that the only reason Petitioner had designated its expert shortly before trial was that the Respondents had refused to identify their own expert prior to being ordered to do so by the court. A plaintiff has a right to counteract the opposing

expert's testimony by putting on its own expert to controvert the expert's accuracy and reliability. *Benedict v. U.S.*, 822 F.2d 1426, 1429 (6th Cir. 1988). Moreover, a plaintiff has no duty to anticipate a defendant's defense. *Benedict*, at 1429. It was not until a few weeks before the original trial date that the District Court finally ordered the Respondents to comply with the local rules and answer the court interrogatories requiring disclosure of experts and their anticipated testimony. Until Petitioner received notice of the identity of Respondents' proposed expert and had deposed him, Petitioner did not have complete knowledge of all the matters Respondents sought to raise in their defense.

There can be no doubt that the Petitioner's right to use its patent expert to rebut the Respondents' expert at trial was vital to Petitioner's case. Respondents' entire defense consisted of the testimony of two expert witnesses. Because Petitioner's expert was not allowed to reply to the opinion of Respondents' expert as to the patent issues, the opinion of Respondents' expert was uncontested. After hearing the unrebutted testimony of Respondents' patent expert, the jury declined to bring in a verdict for Petitioner on that issue.

Third, the judge refused to allow another of Petitioner's experts, an attorney who had helped to draft the actual contract of sale at issue, to testify as to the meaning of the contract, on the grounds that the contract was not ambiguous. The court later allowed Respondents' patent expert, who had nothing to do with drafting the contract, to testify as to his interpretation of the meaning of the very same contract because it *was* ambiguous.

Following the close of Respondents' case, Petitioner once again offered this same expert to reply to the testimony of Respondents' expert as to the intent of the parties and the meaning of the contract language. The court again refused to allow Petitioner's expert to testify, this time because the court believed that only a patent expert could understand the meaning of the contractual language.[4] The court ignored the fact that the litigation was not about the validity of the patent; the litigation was a simple contractual dispute. The issue was the interpretation of the sales contract and not the validity or invalidity of the patents themselves. *See Allen Archery v. Precision Shooting Equipment*, 865 F.2d 896, 901 (7th Cir. 1989). An attorney who helped draft the contract was clearly in a better position to understand the intention of the parties than a patent expert who had no connection with the transaction. Therefore, if anyone should have been allowed to testify as to the interpretation of the contract, it should have been Petitioner's expert and not Respondents' expert.

Time and evidentiary limitations are improper if they render the trial fundamentally unfair. *Freel*, 681 F.Supp. at 769. A trial court may be reversed if it has abused its discretion in excluding evidence. *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 369 (4th Cir. 1986). An erroneous ruling which relates to the substantial rights of a party is grounds for reversal without the need for a showing of

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[4] The court expressly emphasized its belief that "when you take a non-patent lawyer and put him into doing business that you ought to have a patent lawyer doing and he makes a mistake, it's too bad."

prejudice unless it affirmatively appears from the whole record that the ruling was not prejudicial. *Citron v. ARO Corp.*, 377 F.2d 750 (3d Cir. 1967). In this case the time limits imposed and the admission and exclusion of evidence made the trial fundamentally unfair to Petitioner by giving unfair advantage to the Respondents.

Finally, the trial judge injected himself into the presentation of the Petitioner's case to such a degree that one of the jurors actually produced a t-shirt after trial with a caricature of the judge saying "shut-up and answer the question" to one of Petitioner's witnesses.[5] Throughout

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[5] The trial transcript is replete with interruptions by the trial judge during the cross-examination of the witness. The following exchange is illustrative:

MR. CLEVELAND (counsel for defendants): But valuation counselors, the people that you paid to appraise these patents, came up with a slightly different value than yours, didn't they?

THE WITNESS (Mr. Zucker): No, sir. Let me explain why. The reason that answer is not correct, because I did have discussion with the –

MR. CLEVELAND: Wait a minute.

THE WITNESS: Let me answer the question.

THE COURT: No.

THE WITNESS: I have a right to explain.

THE COURT: You don't have any right – what was your question again.

MR. CLEVELAND: The question is –

THE COURT: Your explanation had nothing to do with his question.

THE WITNESS: I was –

THE COURT: Ask your question again.

MR. CLEVELAND: The value placed on these patents by valuation counselors, the process patents, as shown on page 47, is quite a bit different from the value that you testified about, isn't it?

the trial the judge made frequent comments that the trial was too long and complex. The judge also made numerous

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THE WITNESS: No. The reason that it does not –

THE COURT: Wait just a minute. Your answer is no. See if he wants to ask you anything else. You said that that is a different value than you placed on it. Now that I have forgotten the question.

MR. CLEVELAND: . . . I asked him whether or not the value that valuation counselors put on the process patents was substantially different from the value he testified about yesterday.

THE COURT: And your answer to that is no?

THE WITNESS: Taken – your Honor.

THE COURT: You just – your answer to that is no?

THE WITNESS: The number is obviously different.

THE COURT: All right. All right. Then that's your answer for the moment.

THE WITNESS: But the value –

THE COURT: Wait just a minute. Your answer is obviously, you testified to something differently, didn't you?

THE WITNESS: Your Honor.

THE COURT: I'm asking you a question: Did you place a different valuation on it than that? Did you or did you not?

THE WITNESS: As to the different number, yes.

THE COURT: All right. That's all I want to know if you placed a different –

THE WITNESS: Your Honor, I want –

THE COURT: You listen to me just a minute. You answer my question.

THE WITNESS: All right, your Honor. I'm sorry, your Honor.

THE COURT: You can answer a question.

THE WITNESS: It is definitely a different number, Yes.

THE COURT: All right. Go ahead.

(BY MR. CLEVELAND, Continuing): In fact, Mr. Zucker, the 309 patent, according to the valuation counselors appraisal, is not even the most valuable of the patents of the list, is it?

THE WITNESS: Based on the distribution they have, which is pending on the 309, if the 309 was not in existence,

comments on the evidence, the issues and the techniques of trial counsel. The net effect was to create the impression in the minds of the jury that the Petitioner's case was too long, boring and complicated. At one point during trial, as the jury was being excused, the jury forewoman remarked "We don't look forward to Tuesday."[6]

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those other patents would not have that value. It's only because 309 is in existence that the other patents have value.

If I had been given the opportunity to explain –

THE COURT: Just a minute. He asked you a simple question.

MR. ROSEN (counsel for plaintiff): Your Honor.

THE COURT: Mr. Rosen, I'm going to get these answers. You're going to have plenty of time on redirect examination to ask him questions to further explain what he wants to explain, but he is going to start answering questions.

MR. ROSEN: Your Honor, I'm happy for the Court to ask questions and I'm happy for you to do what you need to do, but I do not think it's appropriate when he is being questioned about somebody else's work and something taken out of context –

THE COURT: You can have him explain all that. I have been allowing him to explain, but he has been going around the world, and I'm going to put a stop to it. I mean, madam foreman and members of the jury, that's got nothing to do with what I think about the case. I just think we're going too far, and don't get any inference what I think about this case. I want to try to get some answers.

[6] THE COURT: How much longer are you going to be on this topic?

MR. CLEVELAND: I'm almost finished with this. Maybe another couple of questions.

THE COURT: I tell you what, I'm fixing to quit. Y'all have had enough, too. I have had enough.

JURY FOREWOMAN: We don't look forward to Tuesday . . .

Obviously, based on the t-shirt and the juror's comment, the judge's message was received.

A Plaintiff is constitutionally entitled to a fair trial before an impartial jury presided over by an unbiased and circumspect judge. *Lane v. Wallace*, 579 F.2d 122 (10th Cir. 1978). Although a judge may participate directly in the examination of witnesses and comment upon the evidence (*Sit-Set, A.G. v. Universal Jet Exchange, Inc.*, 747 F.2d 921 (4th Cir. 1984)), this privilege has its inherent limitations. The trial judge is under a duty to use great care that an expression of opinion upon the evidence should be so given as not to mislead, and especially that it should not be one-sided. *Virginian Ry. Co. v. Armentrout*, 166 F.2d 400 (4th Cir. 1948). Intonations, gestures and

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(Jury Leaving Courtroom.)

THE COURT: Y'all have about killed that jury. I'm not blaming it on anybody, I'm just telling you the facts. You heard what the forelady said . . .

THE COURT: . . . I have never seen a case where the lawyers are better prepared, but you're over-prepared and you're going into this case in detail and this jury is not concerned with – you heard what the forelady said. And the message [the jury] sent to me, is is there any way I could shorten what's going on. . . . They are going to be exasperated. And I don't want [to] fuss with a witness and complain, but this just can't go on . . .

THE COURT: I'm just telling you . . . this jury has said two things. They asked me is there any way I could do something. And you heard what the forelady said. And that was just a spontaneous thing, didn't favor anybody. She just said we really don't look forward to coming back Tuesday. Isn't that what she said? . . .

THE COURT: . . . But I have never had a jury – I never had a juror, in nineteen years, ask a question and make a statement like that jury.

comment of the trial judge, or the comment by itself, may be so improper as to warrant a new trial. *Champeau v. Fruehauf Corp.*, 814 F.2d 1271 (8th Cir. 1987). In this case the trial judge exceeded his privilege to participate in the trial and prejudiced the jury against the Petitioner's case.

In its Brief and Petition for Rehearing Petitioner discussed all these issues of unfairness of the trial. Nothing in the opinion of the Court of Appeals indicates that the issues were ever considered. The Court of Appeals' failure to even discuss the issues amounts to an arbitrary denial of Petitioner's right to appeal and a denial of its right to due process.

SUBMITTING A FORM OF VERDICT TO THE JURY WHICH ASKS THE JURY TO CONSIDER A CLAIM WHICH IS THE EXACT OPPOSITE OF THE CLAIM ACTUALLY MADE BY A LITIGANT PRECLUDES A VERDICT FOR THE LITIGANT ON THAT ISSUE AND AMOUNTS TO A DENIAL OF THE RIGHT TO TRIAL BY JURY ON THAT ISSUE

A trial court has discretion in the use of special verdicts and this discretion is not limited to the decision with respect to such use but extends beyond to the form of the submitted interrogatories once such decision is made. *Scott v. Isbrandtsen Co.*, 327 F.2d 113, 119 (4th Cir. 1964). Although the court is vested with a wide discretion as to the form and substance of the interrogatories, all material factual issues should be covered by the questions submitted. *Id.*; *U.S. Fire Ins. Co. v. Pressed Steel Tank Co., Inc.*, 852 F.2d 313, 318 (7th Cir. 1988); *Simien v. S.S. Kresge Co.*, 566 F.2d 551, 555 (5th Cir. 1978). Failure to submit all material issues to the jury through the special

verdict question is an abuse of discretion which constitutes reversible error. *See U.S. Fire Ins. Co.*, at 318; *Simien*, at 555-556; *Huddleston v. Herman & MacLean*, 640 F.2d 534, 550 (5th Cir. 1981).

Special verdict questions must accurately present the issues in the case so as not to confuse or mislead the jury. *U.S. Fire Ins. Co.*, at 316 *citing Hibma v. Odegaard*, 769 F.2d 1147, 1157 (7th Cir. 1985); *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 690 (11th Cir. 1984). Where the issues as drafted contain contradictions, ambiguities or inconsistencies such that it is impossible for the jury to render a verdict in accordance with their convictions, the verdict must be reversed. *Martin v. Gulf States Utilities Co.*, 344 F.2d 23, 37 (5th Cir. 1965); *Scott* at 123.

In this case it is clear that one of the special interrogatories submitted to the jury by the trial court asked the jury to consider whether the Petitioner had established the exact opposite of its claim. Such an interrogatory made it impossible for the jury to find for the Petitioner on that issue. One of Petitioner's claims at trial was that the Respondents had understated the cost of utilities required to operate the business sold to Petitioner. By providing figures much lower than the actual costs of the utilities required to run the plant, the Respondents created the false impression that the manufacturing business was more profitable than it actually was. Petitioner relied on the utility figures provided to develop proformas which indicated cash flow and profits from the business in future years and thus agreed to pay a much higher price for the business than it was really worth. Moreover, Petitioner will suffer continuing damages because each year utility bills eat up revenues which

Petitioner had counted on in its cash flow projections, thus jeopardizing the entire manufacturing operation. By comparing its own utility costs with those of the Respondents, Petitioner was able to calculate that it had, or would, suffer damages of nearly two and one-half million dollars ($2,500,000.00) due to the Respondents' understatement of utility costs.

Petitioner introduced substantial evidence at trial that Respondents had *understated* utility costs associated with the manufacturing business. Respondents denied this claim and introduced evidence of its own, but neither side claimed that the Respondents had *overstated* the cost of utilities and neither side introduced any evidence to that effect. Nevertheless, the district court prepared a form of verdict with a special interrogatory requesting that the jury consider damages as a result of the Respondents' *overstatement* of utilities which was the exact opposite of what the Petitioner had claimed. Since Petitioner had never claimed that Respondents had overstated utility costs, there was no evidence of overstatement in the record. Therefore, the jury could not possibly consider the issue. Even after counsel for the Petitioner had pointed its error out to the district court, twice, the court refused to correct the form of the verdict.[7]

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[7] The Court instructed the jury regarding the categories of damages set forth in the form of the verdict. After the Court had charged the jury but prior to the commencement of the jury's deliberations, counsel for the Plaintiff advised the Court that the jury verdict form incorrectly read "overstatement of utilities" when the form should read "understatement of utilities". The Court then recalled the jury to provide a supplemental instruction on another issue, but failed to correct

The incorrect form of the verdict inevitably resulted in jury confusion. The jury could not possibly have found that Respondents had overstated the utility costs because that was the exact opposite of what the Petitioner had claimed and tried to prove. In addition, since an overstatement of utilities would not have damaged the Petitioner, the incorrect form of the verdict precluded the jury from returning a verdict for the Petitioner on that issue and denied Petitioner a jury trial as to that issue.

When a fact question is not submitted to the jury, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. *Huddleston*, at 550; *Scott*, at 120. In this case, counsel for the Petitioner demanded the submission of the question of the understatement of utilities to the jury prior to the charging of the jury, and twice pointed out to the court that the form of the verdict incorrectly stated the Petitioner's claim as one for overstatement rather than understatement of utilities. Under the circumstances it cannot be successfully argued that the Petitioner was not entitled to a jury trial of this issue and not entitled to have the jury determine whether the

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the jury verdict form to read "understatement of utilities" or inform the jury that the reference in the form should be "understatement of utilities" rather than "overstatement of utilities". Upon completion of the supplemental charge but again prior to commencement of deliberations, counsel for the Plaintiff called to the Court's attention that he had failed to advise the jury that "overstatement" should read "understatement" in the jury verdict form. The District Judge replied, "No, I didn't intend to".

Petitioner was damaged by the understatement of utilities. *See Scott*, at 121. Unfortunately, the form of the verdict made it impossible for the jury to find for the Petitioner on this issue and thus deprived Petitioner of a jury trial on a claim for nearly two and one-half million dollars. The failure of the Court of Appeals to correct this error by the trial court is such a departure from the accepted and usual course of judicial proceedings and the sanctioning of such a departure by the District Court as to call for an exercise of this court's power of supervision. *See Gibson v. Lockheed Aircraft Service, Inc.*, 350 U.S. 356, 357-58 (1956).

Compounding its error, the District Court incorrectly instructed the jury that the Petitioner could obtain an immediate injunction to prevent others from infringing on its patents, even if the Respondents, who had previously held the patents, had been guilty of laches in failing to prevent others from infringing on the patents.[8] Not

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[8] The court first charged the jury that "laches alone on the part of the Defendant . . . would not prevent the Plaintiff from enforcing the patent that it bought." The error was repeated with the statement that "if the Plaintiff bought the patent and the Defendant is guilty only of what we call laches, unreasonable delay which it acted to the prejudice of some infringer [sic], the Plaintiff, when he bought the patent, could stop an infringer." Finally, pursuant to the jury's specific request that the court "go over the law" of laches and estoppel, the court expressly stated that "the law is that if Remington was guilty of laches, not estoppel, guilty of only laches, . . . when they assigned those patents, that the assignee, *the plaintiff, could have immediately brought a suit to stop infringers and gotten an injunction, whatever they wanted to do, because under the law the only damage that an assignee has from laches on the part of the original owner is an inability to sue for past damages.*" (emphasis added).

only is this instruction contrary to applicable case law, but it precluded the jury from properly considering the relevance of Respondents' dilatory conduct in pursuing infringement suits and failure to disclose the existence and extent of known infringement.

Laches may defeat claims for injunctive relief, including preliminary injunctive relief. *Armco, Inc. v. Armco Burglar Alarm Co.*, 693 F.2d 1155, n. 14 at 1161 (5th Cir. 1982). A patent owners' delay in bringing an action is a bar to preliminary injunctive relief even despite a strong showing that the owner is likely to prevail on the issues of infringement and validity. *See Preliminary Injunctions in Patent and Trademark Cases*, Trial, p. 42, March 1990. *See also Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533 (Fed. Cir. 1991). A successor in interest is charged with the consequences of the patentee's knowledge of potential infringement and laches, or dilatory conduct in bringing a patent infringement action. *MGA, Inc. v. Centri-Spray Corp.*, 679 F.Supp. 1238, 1242 (E.D.Mich. 1986) (A patentee sometimes has notice of potentially infringing activity even before the issuance of the patent). *See also Continental Coating Corp. v. Metco Inc.*, 464 F.2d 1375, 1377 (7th Cir. 1972).[9]

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[9] That the court was confused as to this point of law is evident from the court's comments to Plaintiff's counsel:

"It just seems like when you wipe the docket clean when you sell the patents, if all . . . the seller is guilty of is laches, he might not be able to impose patent, but once he sells it to a stranger, the stranger has got just as much right as if it were a brand new patent, except the stranger can't sue for past damages. Now I want you to show me a case that holds to the contrary."

The Court's incorrect charge to the jury, however, required the erroneous conclusion that even if Respondents had failed to disclose the relevant facts regarding the patents and known infringement, in violation of express contractual provisions, so long as Respondents were only guilty of laches, Petitioner suffered no injury because Petitioner had the right to seek and receive immediate preliminary injunctive relief. This was absolutely untrue. The importance of this charge to the jury's deliberations is evident in the jury's request that the court clarify the law regarding laches and estoppel as it related to the case. The jury was thus led to believe that the substantial consideration paid for the patents was not lost since Plaintiff could get injunctive relief and promptly exclude competition.

The exclusive right to exclude competition comprises the principal value of a patent. *H. H. Robertson, Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 390 (Fed. Cir. 1987). Where an infringer is allowed to continue operations *pendente lite*, the patentee has lost all the value of that patent during "the notoriously lengthy course of patent litigation. . . . " *Id.* If the patentee cannot obtain injunctive relief and stop infringement, the patent is worthless or at best worth only a fraction of its possible value. *See Smith Int'l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1578 (Fed. Cir. 1983). Therefore, jury instructions indicating that the patentee or his successor could obtain immediate injunctive relief when this is in fact not true or, at best, seriously in doubt, clearly misled the jury and essentially precluded a verdict for Petitioner on that issue.

From the limited jury award in favor of Petitioner, it is evident that the jury found that Respondents had

misrepresented the status of the patents to Petitioner. However, the court's erroneous jury instructions prevented the jury from correctly assessing the damages resulting from Respondents' misrepresentation. This, too, denied the Petitioner a trial by jury on the issue of misrepresentation, the principal claim of the Petitioner at trial.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted and the Court should allow the Petitioner to file its brief and to articulate more comprehensively why the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of South Carolina failed to afford essential due process by denying Petitioner a fair trial and a reasonable review of the issues on appeal. Further, the Writ should be granted to allow the Petitioner to more fully elaborate on the denial of Petitioner's right to trial by jury due to the submission of an improper special interrogatory and an incorrect jury instruction on Petitioner's two major claims which made it impossible for the jury to find for the Petitioner on those issues. These very

important constitutional issues are clearly a matter for resolution by this Court.

Respectfully Submitted,

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APPENDIX 1

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REMGRIT CORPORATION, *Plaintiff-Appellant,* v. REMINGTON ARMS COMPANY, INCORPORATED; E I DU PONT DE NEMOURS AND COMPANY, *Defendants-Appellees,* and ZBS HOLDINGS, *Defendant.*	No. 91-2565

REMGRIT CORPORATION, *Plaintiff-Appellee,* v. REMINGTON ARMS COMPANY, INCORPORATED; E I DU PONT DE NEMOURS AND COMPANY, *Defendants-Appellants,* and ZBS HOLDINGS, *Defendant.*	No. 91-2578

REMGRIT CORPORATION,
Plaintiff-Appellee,

v.

REMINGTON ARMS COMPANY, INCORPORATED; E I DU PONT DE NEMOURS AND COMPANY,
Defendants-Appellants,

and

ZBS HOLDINGS,
Defendant.

No. 92-1218

Appeals from the United States District Court
for the District of South Carolina, at Charleston.
Solomon Blatt, Jr., Senior District Judge.
(CA-88-266-2-8)

Argued: May 4, 1992

Decided: September 20, 1993

Before WIDENER, PHILLIPS, and MURNAGHAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Richard Steven Rosen, ROSEN, ROSEN & HAGOOD, Charleston, South Carolina, for Appellant. Raymond Michael Ripple, Legal Department, E.I. DU PONT DE NEMOURS & COMPANY, Wilmington, Delaware, for Appellees. **ON BRIEF:** H. Brewton Hagood,

ROSEN, ROSEN & HAGOOD, Charleston, South Carolina, for Appellant. William C. Cleveland, HAYNSWORTH, MARION, MCKAY & GUERARD, Charleston, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

This case arises out of RemGrit Corporation's purchase of an abrasive products business formerly owned by Remington Arms Co. and E.I. DuPont De Nemours & Co. in June 1986. In October 1988 RemGrit filed an amended complaint against Remington and DuPont, which alleged that DuPont and Remington had breached the June 1986 Purchase and Sale Agreement with RemGrit, breached certain warranties contained in the Purchase and Sale Agreement, and negligently misrepresented the condition of its business and assets in several respects during negotiations. RemGrit complained about the status of its patents, variable margin costs, labor matters, utilities costs, business valuation, and other material information related to the business. RemGrit requested rescission of the Purchase and Sale Agreement or, alternatively, actual and consequential damages and interest.

Remington and DuPont denied the allegations in the amended complaint and filed counterclaims, which alleged that RemGrit owed Remington $244,709.88 in

reimbursement for real and personal property taxes pursuant to the Purchase and Sale Agreement and that RemGrit owed $118,413 for inventory transferred pursuant to the Purchase and Sale Agreement.

Remington and DuPont filed a motion for partial summary judgment. The district court granted summary judgment against RemGrit on the issues of the rescission remedy and the taxes. It later computed the amount and awarded Remington and DuPont the sum of $208,457.29 on account of real and personal property taxes paid and entered judgment against RemGrit in that amount. The issues submitted to the jury were whether Remington and DuPont had breached a warranty, and whether Remington and DuPont had made negligent misrepresentations to RemGrit. Also submitted to the jury were the extent of damages on any overstatement of utilities claims, any overpayment for the inventory, and any loss of patent value. The jury found that Remington and DuPont had not breached a warranty, but that they had made a negligent misrepresentation to RemGrit and awarded $100,000 for damages for loss of patent value. The district court entered judgment against Remington and DuPont in that amount. Remington and DuPont made a motion for judgment notwithstanding the verdict, which was denied. RemGrit made a motion for a new trial, which was also denied. Both parties appeal.

In this consolidated appeal, RemGrit alleges eleven errors: (1) the district abused its discretion in imposing a twenty-hour limit on the presentation of evidence; (2) the district court excessively participated in the trial and influenced the jury's verdict; (3) the jury instructions incorrectly asserted that RemGrit could have sought a

preliminary injunction to mitigate its patent infringement losses; (4) the district court abused its discretion in denying RemGrit's request to present an expert witness; (5) the jury verdict form misstated the claim for the utilities fees and thereby mislead the jury; (6) the district court improperly denied RemGrit a new trial because the damages awarded by the jury were inadequate; (7) the district court erred in its calculation of RemGrit's tax liability; (8) the district court erred in excluding out-of-pocket interest from the patent damages award; (9) the district court erred in denying RemGrit's Rule 60(b) motion for a new trial; (10) the district court abused its discretion in denying RemGrit a hearing on its Rule 60(b) motion; and (11) the district court erred in denying RemGrit's motion to supplement the record. DuPont and Remington cross-appeal, alleging two errors: (1) the district court erred in denying their motion for judgment notwithstanding the verdict on their inventory claim; and (2) the district court erred in denying their motion for judgment notwithstanding the verdict on RemGrit's negligent misrepresentation claim. In addition, we have pending before us Remington and DuPont's motion to strike the deposition of Paul Bell from the appendix because they say it is not properly a part of the record.

I.

We turn first to the motion to strike. Rule 10(a) of the Federal Rules of Appellate Procedure provides that "[t]he original papers and exhibits filed in the district court . . . shall constitute the record on appeal in all cases." Fed. R. App. P. 10(a). RemGrit filed the deposition of Bell as an exhibit to its motion in the district court to supplement

the record. DuPont and Remington appear to argue that because the district court denied RemGrit's motion as untimely, the exhibit may not be included. However, Rule 10(a) is clear. Even if we assume that RemGrit's motion was wholly untimely and without merit, that makes no difference to Rule 10(a). The Bell deposition was filed by RemGrit as an attachment to its motion and thus it became a part of the record. So we deny Remington and DuPont's motion to strike.

II.

We next turn to the thirteen issues the parties have presented on appeal. Even a casual review of the briefs in this case reveals that what both parties are really complaining about is the jury verdict. RemGrit asked the jury for $5,379,540. DuPont and Remington wanted to be released from any liability on the patent claims and to recover $118,413 for the inventory. The jury came up with a verdict that neither side liked.

We have considered the briefs and the record in this case and, after oral argument, are of opinion that the evidence in the case supports the verdict and that there is no reversible error.

The motion of Remington and DuPont to strike the Bell deposition from the appendix is

DENIED.

The judgment of the district court is

AFFIRMED.

APPENDIX 2

UNITED STATES DISTRICT COURT

DISTRICT OF
SOUTH CAROLINA
CHARLESTON DIVISION

REMGRIT CORPORATION

Plaintiff

V.

REMINGTON ARMS CO., INC., and E.I. DU PONT DE NEMOURS & COMPANY,

Defendants.

JUDGMENT IN A CIVIL CASE

(Filed May 10, 1991)

CASE NUMBER: 2:88-0266-8

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court.** This action came hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That each party shall bear its own costs of litigation.

IT IS FURTHER ORDERED that the plaintiff, Remgrit Corporation shall have judgment against defendants, Remington Arms Co., Inc., and E.I. Du Pont De Nemours and Company, in the amount of one hundred thousand and no/100th ($100,000.00) Dollars.

IT IS FURTHER ORDERED that defendants, Remington Arms Co., Inc., and E.I. Du Pont De Nemours & Company, shall have judgment

against plaintiff, Remgrit Corporation in the amount of two hundred eight thousand four hundred fifty-seven and twenty-nine /100th ($208,457.29) dollars.

IT IS FURTHER ORDERED that neither plaintiff nor defendants shall receive prejudgment interest on the sums awarded herein to each of them.

IT IS FURTHER ORDERED that all relief not herein specifically granted is denied.

May 10, 1991 — Date

ANN A. BIRCH
Clerk

/s/ Anne Holcomb Jones
ANNE HOLCOMB JONES
(By) Deputy Clerk

APPENDIX 3

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 13, 1993

No. 91-2565

CA-88-266-2-8

REMGRIT CORPORATION
Plaintiff - Appellant

v.

REMINGTON ARMS COMPANY, INCORPORATED;
E.I. DU PONT DE NEMOURS AND COMPANY

Defendants - Appellees

and

ZBS HOLDINGS

Defendant

No. 91-2578

CA-88-266-2-8

REMGRIT CORPORATION
Plaintiff - Appellee

v.

REMINGTON ARMS COMPANY, INCORPORATED;
E.I. DU PONT DE NEMOURS AND COMPANY

Defendants - Appellants

and

ZBS HOLDINGS

Defendant

No. 92-1218

CA-88-266-2-8

REMGRIT CORPORATION
Plaintiff - Appellant

v.

REMINGTON ARMS COMPANY, INCORPORATED;
E.I. DU PONT DE NEMOURS AND COMPANY

Defendants - Appellees

and

ZBS HOLDINGS

Defendant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

REMGRIT CORPORATION, Plaintiff, v. REMINGTON ARMS CO., INC., and E.I. DU PONT DE NEMOURS & COMPANY, Defendants.	) CIVIL ACTION NO. 2:88-0266-8 ORDER (Filed May 6, 1991)

April 25, 1991, this matter came before the court for hearing on post-trial motions filed by both parties, as follows: defendants' motion for clarification of judgment; defendants' supplemental motion for clarification of judgment; defendants' motion for judgment notwithstanding the verdict; and, plaintiff's motion for new trial.

All motions presented were considered and denied without oral argument except: the parties' request for an award of costs; plaintiff's request for new trial on the basis of its objection to the form of the verdict; the parties' dispute as to the amount of taxes owed; and, the parties' oral motions for pre-judgment interest.

Defendants' supplemental motion for clarification of judgment requests that the court award costs to defendants as the prevailing parties rather than plaintiff.

Defendants argue that despite the jury verdict for plaintiff, defendants' success on the counterclaim for taxes exceeds the plaintiff's damage award; therefore, defendants should be considered the prevailing parties and, as such, are entitled to costs. Plaintiff asserts that it is the prevailing party as a result of a favorable jury verdict and, therefore, is entitled to an award for costs.[1]

Unless otherwise directed by the court, costs are allowed to the prevailing party. Rule 54(d), *Fed. R. Civ. P.* In this case, plaintiff received a favorable verdict on one issue of several submitted to the jury. However, pre-trial, the court granted the defendants' motion for summary judgment on a counterclaim against plaintiff for reimbursement for taxes paid by defendants. Each party's success reaped substantially the same monetary benefit; therefore, in this court's view each party "prevailed." Plaintiff and defendants are large corporate entities; none will be unduly burdened by the absorption of its own costs of litigation. For these reasons, and the reasons orally advanced at hearing, each party's request for an award of costs is hereby denied, and each party shall pay its own costs.

In plaintiff's motion for new trial, plaintiff complains that the form of the verdict was misleading on the utilities issue in that it failed to properly submit the issue as defendants' "understatement of utilities" as alleged by

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[1] Plaintiff received a $100,000.00 judgment from the jury for alleged misrepresentations by defendant as to the value of patents purchased under the contract. The jury had been instructed to reduce any award for breach of contract by $100,000.00 pursuant to a contractual proviso.

plaintiff. The court is satisfied that the jury was well versed as to the alleged "understatement of utilities" after the lengthy presentation of evidence and argument by counsel and that the court's charge on the issue was clear. Accordingly, for these reasons, and for the reasons enunciated at hearing on this and the other grounds submitted in support of plaintiff's motion for new trial, plaintiff's motion for new trial is hereby denied.

At hearing each party orally moved the court for pre-judgment interest. Having reviewed the Connecticut case law submitted by the plaintiff on the issue of pre-judgment interest, this court finds that an award of pre-judgment interest is within the discretion of the trial court in an action brought under Connecticut state law.

> The determination of whether or not interest is to be recognized as a proper element of damage, is one made in view of the demands of justice rather then [sic] through the application of any arbitrary rule . . . The real question in each case is whether the detention of the money is or is not wrongful under the circumstances . . . Whether a sum in certain circumstances has been liquidated may, of course, be a useful although not necessarily controlling criterion (citations omitted).

Walter Kidd Constructors, Inc. v. State, 37 Conn.Sup. 50, 434 A.2d 962, at 978, quoting *Southern New England Contracting Co. v. State*, 165 Conn. 644, 664 345 A.2d 550 (1974).

Each party advanced a potentially valid interpretation of the contract in support of its theory of the tax issue. Until the court decided that issue, the amount of tax to be paid by each party was uncertain, and thus, not

a liquidated amount. However, even had damages on the tax issue been liquidated, the court finds that the retention of the money awaiting judicial interpretation of the contract was not unreasonable and that an award of pre-judgment interest to defendants on tax dollars paid on behalf of plaintiff is not appropriate. Further, this court finds, under the facts of this case, an award of pre-judgment interest on the jury verdict based upon plaintiff's unliquidated claim is also inappropriate. Accordingly, acting within its discretion, the court is of the opinion that each party's request for pre-judgment interest should be denied.

The amount of real estate tax and personal property tax to be paid by defendants, as sellers, and plaintiff, as buyer, has been heavily disputed by the parties. Having reviewed the contract, the affidavits, and the documents submitted, this court finds that defendants are liable for all taxes which became due on the subject property, real and personal, as of April 1, 1986, which was payment for taxes for the period from April 1, 1986, to midnight June 30, 1986. Plaintiff is liable for all taxes due thereafter beginning July 1, 1986. This court finds that defendants paid real estate taxes due in the first two quarters following the sale of property, and thus, is entitled under the contract to reimbursement from plaintiff in the amount of one hundred forty-seven thousand eight hundred two and eighty-four one-hundredths dollars, ($147,802.84). Further, the court finds that defendants paid personal property taxes after the sale on property transferred to plaintiff and that defendants are entitled to reimbursement from plaintiff in the amount of sixty thousand six

hundred fifty-four and forty-five one-hundredths dollars, $60,654.45). Accordingly,

IT IS ORDERED that each party shall bear its own costs of litigation.

IT IS FURTHER ORDERED that plaintiff shall have judgment against defendants in the amount of one hundred thousand and no one-hundredths dollars ($100,000.00).

IT IS FURTHER ORDERED that defendants shall have judgment against plaintiff in the amount of two hundred eight thousand four hundred fifty-seven and twenty-nine one-hundredths dollars ($208,457.29).

IT IS FURTHER ORDERED that neither plaintiff nor defendants shall receive pre-judgment interest on the sums awarded herein to each of them.

IT IS FURTHER ORDERED that all relief not herein specifically granted is denied.

IT IS SO ORDERED.

Charleston, South Carolina

May 6, 1991

/s/ Sol Blatt, Jr.
Sol Blatt, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

REMGRIT CORPORATION, Plaintiff, v. REMINGTON ARMS CO., INC., and E.I. DU PONT DE NEMOURS & COMPANY, Defendants.	)	C/A No. 2:88-0266-8 AMENDED COMPLAINT (Filed Oct. 21, 1988)

The Plaintiff complaining of the Defendants alleges and states as follows:

FOR A FIRST CAUSE OF ACTION

1.

This is a civil action for breach of warranty and negligent representation arising under the laws of South Carolina and Connecticut.

2.

The Plaintiff, RemGrit Corporation ("RemGrit"), is a South Carolina corporation with its principal place of business in Charleston, South Carolina, and is a wholly owned subsidiary of The InterTech Group, Inc., a South Carolina corporation with its principal place of business in Charleston, South Carolina.

3.

The Defendant, Remington Arms Company, Inc. ("Remington"), is a Delaware corporation with its principal place of business in Wilmington, Delaware, and is a wholly owned subsidiary of the E.I. du Pont de Nemours & Company. Remington is doing business in the State of South Carolina.

4.

That the Defendant, E.I. du Pont de Nemours & Company ("du Pont"), is a Delaware corporation with its principal place of business in Wilmington, Delaware, and is a foreign corporation qualified to do business in South Carolina and doing business in South Carolina.

5.

RemGrit, Remington and du Pont are in the business of manufacturing. That Remington and du Pont were desirous of selling their abrasive products business to RemGrit, and Remington, acting as seller, entered into a Purchase and Sale Agreement dated June 27, 1986 with RemGrit, as buyer, for the purchase and sale of the Remington abrasive products business located in Bridgeport, Connecticut, to Plaintiff.

6.

That the amount in controversy herein exceeds the amount of Ten Thousand ($10,000.00) Dollars exclusive of interest and costs.

7.

That jurisdiction of this Court is based on diversity of citizenship and amount in controversy. 28 U.S.C. §1332.

8.

That Remington and du Pont, for the purpose of inducing RemGrit to purchase the Defendants' abrasive products business, provided to RemGrit certain financial information, representations, warranties, covenants and agreements, many of which. are contained in the Purchase and Sale Agreement dated June 27, 1986.

9.

That Defendants/Sellers, Remington and du Pont, expressly warranted, represented and covenanted that (a) the financial information, representations, warranties, covenants and agreements provided to Plaintiff fairly set forth the matters presented therein and were a reasonable financial and business summary of the abrasive products business being sold by Defendants to Plaintiff; and further, that (b) no representation, warranty, statement, certificate, schedule or document furnished to Plaintiff contained any untrue statement of a material fact, or omitted any material fact necessary to make the statements made not misleading; and (c) that there were no threatened disputes or any other event or condition of any character pertaining to, and which may or could have a material adverse effect on the results of operations or business, or financial condition of the abrasive products

business being sold. Defendants, further, expressly warranted, represented and covenanted that the abrasive products business being sold to Plaintiff was not subject to any material, adverse change in the results of operations.

10.

Plaintiff, throughout the negotiations prior to the sale, sought from Defendants material information concerning marketing studies and competition of the Defendants. Defendants, despite repeated requests from Plaintiff, provided no such information with the exception of one study, which was provided to Plaintiff prior to closing; and Defendants represented to Plaintiff that no other material information was available.

11.

Subsequent to closing and the execution of the Purchase and Sale Agreement, Plaintiff discovered that relevant, material information regarding marketing and competition existed, and was within the knowledge, custody and control of the Defendants. Such information had not been provided to Plaintiff prior to execution of the Agreement and closing.

12.

That notwithstanding Plaintiff's requests and the Defendants' knowledge and understanding that such

information was vital, material information and necessary to be provided to Plaintiff, Defendants failed to provide such information.

13.

That despite Defendants' warranty and agreement to provide material information and not to omit any material fact necessary to make information and statements provided to Plaintiff not misleading, Defendants failed to provide material information concerning, among other things, marketing studies, competition and trademark infringment [sic] information, all of which would have been vital and material information; and Defendants represented to Plaintiff that no such information existed.

14.

That, in fact, the financial and other information presented to Plaintiff and contained in the Purchase and Sale Agreement, and upon which the purchase price was based, was negligently, carelessly and recklessly represented to the Plaintiff and was false:

A. Defendants substantially misrepresented the variable margin for the business;

B. Defendants represented that process utility costs for the manufacturing facility were substantially less than they were, in fact;

C. The financial information presented to Plaintiff and upon which the purchase price was based, overstated the value and stage of completion of the inventory;

D. Defendants represented that there were no threatened disputes or any other event or conditions which may or could have a material adverse effect on the results of operations or business, or financial condition of the abrasive products business;

E. Defendants represented to Plaintiff that it would have upon sale a trained labor force.

15.

That, in fact, the actual margin experienced by the business and by the Plaintiff after purchase was substantially less than as represented by Defendants; utility costs for the manufacturing facility were substantially higher than as represented by Defendants; that a trained labor force was not provided; the value of the business sold to Plaintiff was overstated; the value and stage of completion of inventory was substantially less than as represented by Defendants; contrary to information provided by Defendants to Plaintiff, infringment [sic] of patents owned by Defendants and sold to Plaintiff had occurred which further substantially decreased the value of the business sold to Plaintiff.

16.

That the representations, warranties, covenants and omissions made by Defendants in connection with the sale of the abrasive products business purchased by Plaintiff were negligently and/or recklessly made and were misleading, and Defendants were negligent, careless and/or reckless in providing this material information to

Plaintiff and in failing to provide other vital, material information. Plaintiff acted upon Defendants' representations in purchasing the business at a price substantially higher than its value and Plaintiff had a right to rely upon such representations. Defendants, through their authorized agents and employees, made negligent, careless and/or reckless and/or untrue representations concerning the abrasive products business sold to Plaintiff and Plaintiff did not know that such representations were untrue, negligently, carelessly and/or recklessly made.

17.

That with respect to the foregoing omissions, representations and misrepresentations, the Defendants had the means of knowing, or should have known, of the inaccuracy or falsity of such representations, and of the need for accurate, complete and truthful disclosure.

18.

That the Defendants failed to exercise reasonable care or competence in obtaining, providing and communicating the aforesaid information to Plaintiff knowing that Plaintiff would rely upon the information provided. Defendants knew and intended that Plaintiff rely on the information provided.

19.

That as a result of its reliance on the misrepresentations and inaccuracies provided to it by Defendants, Plaintiff has suffered substantial damages in that the

abrasive products business it purchased from the Defendants is worth substantially less than the purchase price paid; and Plaintiff has incurred substantial additional costs in utilities, labor and training its labor force, together with substantial legal fees required to protect its patents.

20.

That Plaintiff has demanded rescission of the transaction and has offered to return everything of value conveyed to Plaintiff as part of the sale of the abrasive products business provided that the Defendants restore the Plaintiff to its position prior to purchase of the abrasive products business by returning the consideration paid at closing and reimbursing Plaintiff for capital invested in the abrasive products business subsequent to closing up until the time of reconveyance to Defendant.

21.

That the Defendant has refused Plaintiff's request to rescind the purchase and sale of the abrasive products business.

FOR A SECOND CAUSE OF ACTION

22.

That Plaintiff realleges as if fully set forth herein the allegations of paragraphs 1 through 21 of the first cause of action.

23.

That the Defendants, in connection with the purchase and sale of its abrasive products business to Plaintiff, expressly warranted to Plaintiff that certain financial information, representations, warranties, covenants and agreements were true and accurate and fairly set forth the matters presented therein, and were a reasonable financial summary of the abrasive products business being sold to Plaintiff.

24.

That many of the warranties, representations and covenants and much of the financial information provided to Plaintiff by Defendants were incorrect or false.

25.

That Defendants have breached their contract with Plaintiff and breached its warranties in the following particulars, which are so substantial that said breaches defeat the purpose of the purchase and sale agreement entered into by the parties:

A. That the variable margin for the business was incorrectly represented;

B. That a trained labor force was not provided;

C. That utilities costs for the business were substantially misrepresented;

D. That the value and stage of completion of the inventory sold with the business was misrepresented;

E. That conditions existed which threatened and which had material adverse effects on the operations of the business which were not disclosed to Plaintiff.

26.

That as a result of the Defendants' breach of warranty and breach of contract, Plaintiff has suffered substantial damages in that it has paid a purchase price far in excess of the value of the business sold to it by Defendants; and Plaintiff has incurred substantial additional costs in utilities, labor and training its labor force, together with substantial legal fees required to protect its patents.

WHEREFORE, Plaintiff prays that the Court grant the following relief:

1. Order rescission of the agreement between Plaintiff and Defendants, with restitution of all monies expended by Plaintiff; or

2. In the alternative, award Plaintiff actual and consequential damages, with prejudgment interest; and

3. Order such other and further relief as the Court may deem just and proper.

ROSEN, ROSEN & HAGOOD

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ATTORNEYS FOR THE PLAINTIFF

Charleston, South Carolina
21 day of October, 1988.

STATE OF)
SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF)
CHARLESTON)

I hereby certify that on the 21st day of October, 1988, a true and correct copy of the Plaintiff's Amended Complaint was hand delivered to:

William Cleveland, Esquire
Haynsworth, Marion, McKay & Guerard
2 Prioleau Street
Charleston, South Carolina 29401

and mailed copies to:

Raymond M. Ripple, Esquire
E.I. du Pont de Nemours & Company
Wilmington, Delaware 19898

ROSEN, ROSEN & HAGOOD

By: /s/ Sylvia G. Eaves
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(803) 577-6726

Charleston, South Carolina

FEB 8 1994
OFFICE OF THE CLERK

No. 93-1120

In The

Supreme Court of the United States

October Term, 1993

REMGRIT CORPORATION,

Petitioner,

v.

REMINGTON ARMS CO., INC., and
E.I. DU PONT DE NEMOURS AND COMPANY,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals abused its discretion in disposing of Petitioner's appeal in an opinion that did not provide detailed reasoning on each of the eleven (11) issues raised by Petitioner.

2. Whether the trial court abused its discretion in not correcting an alleged technical error in the jury form where that error was not material and not prejudicial in light of the entire circumstances surrounding its submission to the jury.

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STATEMENT OF THE CASE

This is a diversity action filed in February 1988, in the United States District Court for the District of South Carolina (Charleston Division) by Remgrit Corporation (Remgrit) against Remington Arms Company (Remington)[1] and E. I. du Pont de Nemours and Company (Du Pont).[2] The complaint sought unspecified damages arising out of an agreement for the sale of Remington's abrasive products business to Remgrit in June 1986. Remgrit claimed breach of warranty and negligent misrepresentation of material facts connected with the business. Remington and Du Pont filed a counterclaim for reimbursement of taxes that should have been paid by Remgrit according to the sale agreement and for $118,413 for the value of transferred inventory. Later, in October 1988, Remgrit was permitted to amend its complaint to seek rescission of its agreement with Remington, to which Remington and Du Pont reasserted their counterclaim.

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[1] During the course of this litigation, Remington was a wholly-owned subsidiary of Du Pont. In December 1993, Remington became an independent company in which Du Pont holds no interest. The interests of Remington in this lawsuit are now represented by Sporting Goods Properties, Inc. , a wholly-owned subsidiary of Du Pont.

[2] There are presently two publicly held entities in which Du Pont, or a subsidiary or affiliated company of Du Pont, owns an interest: Du Pont Canada Inc. is a subsidiary company, and DNA Plant Technology Corporation is a company in which Du Pont holds an indirect minority, non-controlling interest. Du Pont has no parent company, but, in keeping with the spirit of S. Ct. R. 29.1, we note that the Seagram Company Ltd. owns slightly less than 25% of Du Pont common stock.

As part of the sale of the abrasive products business, Remington transferred to Remgrit its 17 outstanding patents related to the abrasive products technology. Only one of these patents was the focus of Remgrit's claims. At trial, Remgrit asserted that there was a breach of the warranty concerning the patents in the Purchase and Sale Agreement. It claimed that after the closing of the sale it learned for the first time that there were other manufacturers of abrasive products tools using the patented technology, and that it was therefore unable to enforce the patent. Nevertheless, the proof showed that Remgrit's president was aware of a competitive study prior to the closing of the deal, and others in Remgrit had knowledge of a suspected infringer prior to the sale of the business.

After lengthy discovery, trial to jury began on February 27, 1990. Immediately before trial, the district court granted Respondents' motion for partial summary judgment, holding Remgrit liable for taxes paid by Remington. The court reserved the determination of the amount due for taxes until after trial. Trial proceeded through March 16, 1990, when the jury returned a verdict upon special interrogatories for Remgrit on one negligent misrepresentation issue, awarding Remgrit $100,000 in damages, but denying all other relief.

Remgrit filed a motion for new trial, and Respondents sought a judgment notwithstanding the verdict. After submissions to the court as to the award of the amount owed to Respondents for payment of taxes, the trial court issued its order on May 6, 1991, disposing of all post-trial matters. (Pet. App. 11-15). The trial court denied the motions for judgment and new trial, ordering that judgment be entered for Remgrit for $100,000 and for

Respondents for $208,457.29 for reimbursement for taxes. The court further denied costs and pre-judgment interests as to all parties. (Pet. App. 15). Judgment was entered accordingly on May 10, 1991.

Notice of appeal was filed by Remgrit on June 3, 1991, and appellees then filed a timely notice of cross-appeal. After full briefing of the issues, the parties having been granted permission by the court of appeals to extend the lengths of their briefs, oral argument was held on May 4, 1992. On September 20, 1993, the court of appeals issued its opinion affirming the trial court in all respects. (Pet. App. 1-6). Remgrit's motion for rehearing and suggestion for rehearing en banc were denied on October 13, 1993. (Pet. App. 9-10).

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN CHOOSING THE FORM OF ITS OPINION

Remgrit claims deprivation of its Fourteenth Amendment[3] due process rights by the failure of the court of appeals to discuss in detail each of the eleven (11) issues it raised below. It is plain from the length of the briefs, the oral argument, and the opinion that the court of

[3] Curiously, Remgrit claims Fourteenth Amendment protection without addressing the threshold issue of state action. In any event, Remgrit did not claim the protections of this provision below.

appeals was well within its discretion to dispose of this case as it did. In any event, Remgrit's argument does not rise to constitutional proportions or otherwise warrant plenary review by this Court.

As this Court recognized in *Taylor v. McKeithen*, 407 U.S. 191, 195 n.4 (1972), the courts of appeals must be given the widest of latitude in fashioning an opinion and in deciding to even write an opinion. See *United States v. Baynes*, 548 F.2d 481, 483 (3rd Cir. 1977). Here, of course, the court of appeals went well beyond the most summary type of affirmance, setting out the operative facts and cataloging the issues raised by both parties. The extent of the consideration is clear on the face of the opinion: "We have considered the briefs and the record in this case and, after oral arguments, are of the opinion that the evidence in the case supports the verdict and that there is no reversible error." (Pet. App. at 6). Litigants before an appellate court can ask for no more than what the court of appeals has done, a comprehensive and deliberate review of their case. Even the most carefully crafted argument of a party deserves no more than was provided.

It is plain from the remainder of Petitioner's argument that it merely wishes to restate arguments made below, none of which merit plenary attention of this Court. (Pet. at 8-17). However, it is clear from its opinion that the court of appeals reviewed the record's testimony and the questions and comments of counsel and the trial court. Petitioner's position plainly is that it still is not satisfied by the verdict. (Pet. App. at 6).

Remgrit complains that it was not allowed to call its patent expert to testify in rebuttal to Remington's expert.

(Pet. at 10, 11). This is simply untrue. Not only was Remgrit allowed to recall its expert to testify in rebuttal to Remington's patent expert, but the trial court offered to recess the trial in order to give Remgrit ample time to arrange for its Chicago patent expert to return to Charleston. What the Court did do was refuse to reverse its pretrial ruling that Remgrit was not entitled to call an *additional* patent expert, whom it had designated after the discovery cutoff.

Remgrit complains that the time limits placed on the presentation of the case were unreasonable. (Pet. at 9, 10). The record will clearly show that Remgrit never made any objection to any aspect of the time limitation imposed by the Court, never proffered to the trial court any specific prejudice, and never asked the trial court to reconsider the limitations imposed. Furthermore, the record will reflect that Remgrit had more than half of its time still available when the case was concluded.

In like manner, Remgrit's allegations regarding the trial court's conduct of the trial, are largely taken out of context. The trial court did express interest in moving the case along, but the record reflects that it did so in an even-handed and absolutely fair manner. Furthermore, Remgrit never made a motion for a mistrial before the trial court based on any issue, much less the points belatedly raised for the first time when the trial was over.

In the end, the court of appeals, after reviewing lengthy record, not only used an appropriate method of deciding this case, but also came to the correct result.

II.

THE ALLEGED JURY INSTRUCTION ERRORS WERE FULLY REVIEWED BELOW AND FOUND TO BE WITHOUT MERIT AND NOT AN ABUSE OF THE TRIAL COURT'S DISCRETION

For the first time, Remgrit now claims deprivation of its Seventh Amendment right to a jury trial by an alleged error in a special interrogatory to the jury, having failed to preserve or argue the constitutional claim below. Remgrit complains that an error in the verdict form caused it great prejudice. Remgrit claims that one word of the special interrogatories that were submitted to the jury was in error in that it called for the jury to make a determination on damages regarding an "overstatement of utilities" when the issue before the jury was whether Remington had understated the utilities that appertained to the site and business being purchased by Remgrit. (Pet. at 19).

It is well settled that formulation of issues and the form of jury interrogatories are committed to the discretion of the trial court. *Klein v. Sears Roebuck & Co.*, 773 F.2d 1421, 1427 (4th Cir. 1985); *Norfolk So. Rw. Co. v. Davis Frozen Foods*, 195 F.2d 662, 666 (4th Cir. 1952). The courts look to whether the interrogatories adequately presented the contested issues to the jury when read as a whole and in conjunction with the general charge, whether submission of the issues to the jury was fair, and whether the ultimate question of fact was clearly submitted to the jury. *Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 1060 (4th Cir. 1976), *cert. denied*, 429 U.S. 980 (1976).

Although Remgrit now complains about the special interrogatory that was a part of the jury verdict form, the fact is that the jury was properly instructed concerning all issues in their case. As reflected by the fact that even Remgrit agreed to their clarity and offered no objection, the judge's instructions to the jury were absolutely clear in every respect. In response to Remgrit's post-trial motions, the district court, reviewing the evidence concluded that the jury well understood the issue. (Pet. App. at 13).

Remgrit also complains that the district court was in error by instructing the jury that Remgrit could have obtained an injunction for infringement of an acquired patent in a previously settled suit, even if Respondents have been responsible for laches. (Pet. at 21-24). Not only did the courts below fully review this argument, but also Remgrit is completely incorrect. The district court properly instructed the jury that laches would not have prevented Remgrit from obtaining either damages or an injunction with respect to continued infringement of a patent. This is a correct statement of the law. *Jamesbury Corp. v. Litton Indust ial Products, Inc.*, 839 F.2d 1544 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 828 (1988); *Leinoff v. Louis Milona & Sons, Inc.*, 726 F.2d 734 (Fed. Cir. 1984).

Remgrit wrongly asserts that the district court instructed the jury that Remgrit could have obtained a preliminary injunction. The district court correctly refused to charge anything regarding Remgrit's alleged inability to obtain a *preliminary* injunction. The court did charge that Remgrit could have immediately *brought a suit* for an injunction. Remgrit quotes the charge (Pet. 21, n.8) but fails to inform this Court that after Remgrit's

request, the district court took great pains to reinstruct the jury that Remgrit could have brought suit only after it had gained sufficient knowledge of infringement to justify a suit for patent infringement.

In light of Remgrit's own unexplained delay of over a year in seeking to enforce its patent rights (which Remgrit never took to a hearing on preliminary injunction), it would have been improper for the jury to attempt to speculate on whether the Respondents' conduct in the early 1970's in fact rendered Remgrit incapable of obtaining a preliminary injunction in 1987. The district court was well within its discretion to find as speculative Remgrit's claim that it was unable to obtain a preliminary injunction, had it ever attempted to do so.

All judges of the district court and the court of appeals who have reviewed these allegations of error in jury instructions have found them to be without merit. There is no basis that would warrant plenary review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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